No. 13,014

IN THE

United States Court of Appeals

For the Ninth Circuit

HENRY T. TANIMURA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING AND THAT THE REHEARING BE HEARD IN BANK.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The above named appellant, Henry T. Tanimura, presents this his petition for rehearing of this cause and respectfully requests that the Court hear the matter in bank and in support of his petition respectfully represents:

PRELIMINARY STATEMENT.

This cause arose out of a suit filed by appellee under the Housing and Rent Act of 1947 joining a legal cause of action under Section 205 of the Act with an equitable cause of action under Section 206

of the Act. The legal and equitable causes of actions have many common issues of fact the main one of which was whether the premises in question are in fact controlled housing accommodations or are in fact a hotel.

Appellant duly made a demand for a jury trial, and appellee moved to strike the same which motion was granted. The cause was tried by Court and a judgment was rendered in favor of appellee for damages in the amount of all of the overcharges occurring within one year prior to the commencement of the action. The lower Court further ordered by way of equitable relief restitution of all overcharges in favor of the tenants and granted an injunction restraining appellant against future violations of the Act.

APPELLANT WAS ENTITLED TO A JURY TRIAL AS TO ALL ISSUES INVOLVED IN THE LEGAL CAUSE OF ACTION AND DENIAL OF THE SAME WAS REVERSIBLE ERROR.

The decision in this cause has silently overruled *Bruckman v. Hollzer,* 152 F. (2d) 730, 9 C.A., a decision decided by other members of the Court still sitting with the Court. The result leaves in doubt the extent of the right of a jury trial in a suit which presents common questions of fact to both legal and equitable causes of action.

In this cause the Court stated:

> "It was within the sound discretion of the court as to whether the equitable issues or the law issues should take precedence in trial. It is

> apparent that the overshadowing purpose of the action by the government as plaintiff was to effectuate rent control law. Those overcharged failed to exercise their right to bring action and had the government been complaisant as to substantial overcharges it would seem but an invitation to lawlessness that would tend to break down the benefits sought by this wartime remedial legislation. Restraint against future violation with statutory damages as a deterrent to law violation motivated the government. In these circumstances the trial judge wisely decided to go immediately to the equitable issues."

It is not evident in deciding this cause that the Court considered the Federal Rules of Civil Procedure and the extent to which Rules 38a and 39a were intended to "preserve" the right of trial by jury under the Seventh Amendment to the Constitution of the United States. This Court has, however, in *Bruckman v. Hollzer,* supra, 152 F. (2d) 730, at page 732, considered this identical question under the Federal Rules of Civil Procedure and resolved the question as follows:

> "Plaintiff contends that whether or not the Di Menna case states the law prior to the adoption of the Federal Rules of Civil Procedure, those rules now give to the party having a claim triable by jury at common law the power to preserve that right when that claim is joined with other equitable issues involving one of the issues of fact in the common law suit. If this contention be correct, it is obvious that, since the right issue of infringement is common to all three sets of

transactions, the right of jury trial on the common law transaction may be preserved only if the court is required to try the common issue so that judgment on the verdict is entered before the equitable claims are decided. This is the view held by Judge Moscowitz in Elkins v. Nobel, 1 F.R.D. 357, 358, and Judge Conger in Dellefield v. Blockdel Realty Co., D.C., 1 F.R.D. 689, 690.

"We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the others. The rules introduce the radical change in federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to 'preserve' in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38(a) provides: '(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.'"

In failing to cite or consider *Bruckman v. Hollzer,* the Court has in this cause, it is respectfully submitted, established a contrary rule which rule it is submitted is unsupported by and contrary to the clear meaning and intent of the Federal Rules of Civil Pro-

cedure. But it does more than that for it invades and limits a constitutionally guaranteed right. Such an invasion should be made with great care. The Court in this case has accepted the dicta of *Orenstein v. United States,* 191 F. (2d) 184, 190, C.A. 1, dicta set forth without citations in support thereof and without consideration of the Federal Rules of Civil Procedure, and in so doing ignored its own well-considered decision on the identical question, *Bruckman v. Hollzer,* supra.

The denial of the right of a jury trial must of necessity in view of the Seventh Amendment to the Constitution be reversible error.

Lewis v. Times Pub. Co., 185 F. (2d) 457, 5 C.A.;

Connolly v. U. S., 149 F. (2d) 666, 9 C.A.;

Bass v. Hoagland, 172 F. 2d 205, 5 C.A., certiorari denied 388 U.S. 816.

In the latter decision, *Bass v. Hoagland,* supra, the Court considered the fundamental nature of the right and went so far as to hold that a judgment in a cause where there had been an improper denial of a trial by jury was void and subject to collateral attack, and at page 209 the Court stated:

> "The right of a jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly an unconstitutional abuse of power."

The Supreme Court has recently in *Dice v. Akron C. & Y. R. Co.,* 96 S. Ct. Supp. No. 8 at page 285,

288, considered the far reaching effect and fundamental nature of the right of trial by jury under the Seventh Amendment and in so doing has concluded that the right follows federal rights even when the same are being litigated in state Courts and under the state rule there would be no right of trial by jury.

It cannot be concluded otherwise than that error can be nothing otherwise than reversible error if that error be a denial of a trial by jury under the Seventh Amendment to the Constitution.

Wherefore, appellant respectfully urges that this petition for a rehearing be granted with the Court hearing the same in bank and that the judgment of the District Court be upon further consideration reversed.

Dated, San Francisco, California,
April 4, 1952.

Respectfully submitted,
C. Dan Lange,
Clyde R. Rockwell,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We, C. Dan Lange and Clyde R. Rockwell, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is in our judgment well founded and that it is not interposed for delay.

Dated, San Francisco, California,
April 4, 1952.

C. DAN LANGE,
CLYDE R. ROCKWELL,
Counsel for Appellant and Petitioner.